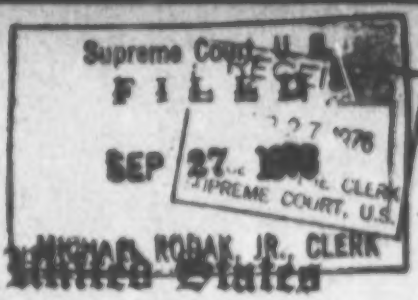

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-443

WILLIAM R. WESSON, Pro Se, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for himself,

Plaintiff-Appellant, Pro Se

Joined By

JOHN CHARLES VAIANI, Pro Se, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for himself.

Plaintiff-Appellant, Pro Se

-v.-

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees,

-and-

MISSOURI PACIFIC RAILROAD COMPANY

Intervening Defendant-Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
SITTING AS A THREE JUDGE COURT

JURISDICTIONAL STATEMENT

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IN THE
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UNITED STATES OF AMERICA and
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Defendants-Appellees,

--and--

MISSOURI PACIFIC RAILROAD COMPANY

Intervening Defendant-Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
DISTRICT OF NEW JERSEY
SITTING AS A THREE JUDGE COURT

JURISDICTIONAL STATEMENT

MERGER OF CASES IN THE COURT BELOW

In this jurisdictional statement, as provided by Rule 15, Paragraph 3 of this Court, appellant, William R. Wesson, pro se, a dissident Class B common stockholder and party to the consolidated civil action in the three-judge court below, United States District Court, District of New Jersey, under Case No. 74-469 from which this appeal is made, is joined by appellant, John Charles Vaiani, pro se, also a dissident Class B stockholder and party to the same consoli-

dated civil action under Case No. 74-470. The jurisdictional statement is written from the standpoint of appellant, William R. Wesson, pro se; and the standpoint of appellant, John Charles Vaiani, pro se, is substantially identical as to pleadings and relief sought.

OPINIONS BELOW

Opinion of the United States District Court, District of New Jersey, sitting as a Three Judge Court, dated April 20, 1976, affirming Interstate Commerce Commission, Division 3, report and order Dated December 14, 1973 appears herein as APPENDIX A.

JURISDICTION

1. This action was instituted on April 3, 1974 by Plaintiff-Appellant, pro se, in the United States District Court, District of New Jersey, pursuant to the provision of the U. S. Code Title 28, Sections 1326, 1398, 2284, 2321, 2325, 2401 and Title 5, Section 1009, to seek review of administrative action of the Interstate Commerce Commission (ICC) Finance Docket No. 27346 in which the ICC approved, under USC Title 49, Section 20a a plan of recapitalization that altered the relative values, rights and privileges of two classes of Missouri Pacific Railroad stock without first ordering a due process of law evaluation of the equity bearing Class B common stock.

This omission of the evaluation deprives the appellant of substantial property, is detrimental to the public interest by creating heavy burdens to the taxpayers, as will be shown subsequently, and is repugnant to the Constitution of the United States, Article I, Section 9 and 10; Article VI, Paragraph 2, and the 5th, 14th, and 16th Amendments.

2. The judgment sought to be reviewed (APPENDIX B) is dated May 4, 1976, was filed on May 6, 1976 and was

based on Opinion dated April 20, 1976 (APPENDIX A.)

On May 20, 1976 Appellant filed a notice for reargument dated May 19, 1976 (APPENDIX C) under Rule 12 I of the General Rules and was denied reargument by Order dated June 22, 1976 and filed June 29, 1976 (APPENDIX D.)

On July 28, 1976 Appellant filed Notice of Appeal to the United States Supreme Court, dated July 26, 1976 (APENDIX E & E-1) in the U.S. District Court of New Jersey.

3. The statutory provisions believed to confer on this Court jurisdiction of this appeal are found under Title 28 USC 1253.

4. Cases believed to sustain the jurisdiction are:

Schwabacher vs. *U.S.* 334 US 182 (1948)
Radio Corp. of America v. *U.S.* 341 US 412

5. The validity of Title 49 USC 20a(7) as it was used in this instant action to affirm a plan of recapitalization which transferred substantial amounts of property and equity privilege from equity bearing Class B common stockholders to non-equity bearing Class A preferential stockholders without the ICC first ordering a current evaluation of the property under Title 49 USC 19a is involved.

Section 20a(7) of the Interstate Commerce Act reads:

"The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligation or liabilities in accordance with the provisions of this section without receiving approval other than as specified herein."

QUESTIONS PRESENTED BY THE APPEAL

1. May the ICC, acting under Section 20a of the ICC ACT (49 USC 20a) affirm a recapitalization plan of the Missouri Pacific Railroad (MOPAC,) a financially sound, efficiently equipped, and well operated railroad, which plan transfers substantial equity (61% or more) together with equity rights and privileges from Plaintiff-Appellants common equity bearing Class B stock, to the Class A $5 preference stock, without compensation for the 61% of equity taken, and without first ordering a current evaluation of the intrinsic value of the property under 49 USC 19a, in accordance with stockholder rights affirmed by the ICC in the "1956 Agreed Plan of Reorganization" (290 ICC 477), the provisions of which had been in existence and trusted by investors and stockholders for over seventeen years, and in accordance with the "due process" provisions of the 5th Amendment of the Constitution?

2. Does Section 20a of the ICC Act, with its exclusive and plenary jurisdiction conferred by 20a(7), stand above the plenary dictates of the U. S. Constitution in matters of individual property rights, sanctity of contracts, and ex-post facto law?

3. When Congress enacted the exclusive and plenary jurisdiction Sections 20a(7) and 20b(5) of the ICC ACT under Title 49 USC, did Congress mean to create a "Fourth Branch" of the United States Government, with powers which are difficult of redress by the original Three Branches because of the lobby and power of the regulated?

4. Did Alleghany Corp. have the right to vote 21,234 shares of Class B stock held in trust by the Franklin National Bank, which trust was under the continuing jurisdiction of the ICC, because Alleghany purchased Jones Motor Co., in violation of Section 5(4) of the ICC Act?

5. Did the Court below fail to make meticulous finding as to fact and law, and did it ignore the questions raised?

STATEMENT OF FACTS AND STATEMENT OF CASE

1. As a result of the "1956 Agreed Plan" of Reorganization 290 ICC 477 at 597 - 98 and 624 - 25, MOPAC was authorized to issue two classes of stock: Class A (issued to former preferred stockholders) and Class B (issued to former common stock holders.) Class A was entitled to $5 maximum dividend if earned and declared without further participation in any one year and $100 in liquidation. *Class B* was entitled to distributions after $5 to the Class A without limitation and was made *residuary beneficiary of any future prosperity the property may enjoy.* Each share of both classes of stock had one vote with a majority of each class voting required to change the capitalization. Of the total stock outstanding, approximately 1,864,332 shares (98% were held by Class A stockholders, and 39,731 shares (2%) were held by the Class B stockholders.

2. Relying upon this capitalization, charter, and contract, plaintiff-appellant began making purchases of the Class B stock in January 1961, and continued until May 1972, when 75 shares had been accumulated. More than 60 of his invester clients also made purchases, relying on the substantial earning power of the Class B and its position as residuary beneficiary of the future prosperity the property might enjoy and was enjoying, even though the controlling management, through the Class A, only awarded the Class B $5 per year in dividends per share when the railroad was earning $500 to $1,000 per Class B share in recent years.

3. This Honorable Court upheld the rights and privileges of the Class B stockholder under the "1956 Agreed Plan" on February 27, 1967, when the same corporate management of MOPAC and Mississippi River Corporation, (MRC) as in this instant case, tried through a recapitalization scheme at that time to substantially reduce the equity of the Class B shares to $100 when the retained earnings alone were $6,500 per Class B. share. This Honorable Court, in an 8 to 0

decision with one abstention, prevented this huge transfer of equity from the Class B to the Class A shares at that time. *Levin v. Mississippi River Corp.* 386 US 162. (APPENDIX F Page 13.)

The Interstate Commerce Commission refused to submit an amicus curiae brief in the voting matter under the "1956 Agreed Plan" to this Court at that time. Consequently, on October 4, 1966, plaintiff appellant had nine copies of 290 ICC 477 containing the "1956 MOPAC Agreed Plan" properly certified by the ICC, and forwarded one to each judge of this Honorable Court, together with a photograph of the back of the Class B stock certificate showing the rights and privileges of the stockholders.

4. Plaintiff appellant is now confronted in this instant action with a similiar recapitalization plan which transfers 61% or more of the Class B equity to the Class A without compensation, and the transfer has been so arranged that the losing Class B common stockholders pay ruinous taxes, and the gaining Class A preference stockholders pay no taxes on approximately $623,000,000 equity transferred from the Class B! (APPENDIX F Page 7.)

This instant recapitalization plan emerged as a convoluted settlement of a class action suit instituted by Class B stockholders in December 1967 on dividends and conspiracy without recapitalization ever being mentioned in any of the motions, notices, or pleadings, and with no intervention after December 20, 1968. That suit was instituted because of the denegation of the Class B property by Class A stockholding officers of MOPAC and MRC. The settlement agreement for the recapitalization plan was not signed by either of the minority Class B stockholders who initiated the suit, Levin or LeVasseur, but rather by the three large corporate parties; MOPAC, MRC, and Alleghany Corp., the last of which did not have a mutuality of interest with the other minority Class B stockholders. (APPENDIX F Page 3.)

5. The terms of the settlement agreement and recapitalization plan found in Footnote 1 Page 6 of Appendix A *extinguished both classes of securities;* the Old Class A $5 preference stock which owned 34.5% of the consolidated stockholders equity of MOPAC, and the old Class B common, which owned the remaining 65.5% of such stockholders equity as of December 31, 1972 based on ICC accounting and being the liquidating value of their stock, according to the MOPAC Proxy Statement of May 8, 1973 Page 11. *However, the consolidated stockholders equity in the MOPAC 1972 Annual Report, as shown on Page 21, is based on 1955 property values determined at the time of the "1956 Agreed Plan" of Reorganization.* (There has been substantial appreciation of this property in the intervening twenty years.)

The change in equity of the two classes of stock after this instant recapitalization follows:

a. Each of the 1,864,352 old shares of Class A $5 preference stock was exchanged for a new $5 cumulative convertible preferred, convertible into one share of new common.

b. Each of the 39,731 old shares of Class B common stock was exchanged for 16 shares of new common and $850 cash, which cash came from Class B capital account but was in opinion of MOPAC council, taxable as current income, thus being of great benefit to Alleghany Corp, but adverse to other Class B stockholders. (MOPAC Proxy Statement of May 8, 1973 Page 12.)

Consequently, upon full conversion of the new preferred, there would be 2,500,048 shares of new common outstanding, and the equity ratios would be changed as follows:

	New Common Shares	Percentage of Equity Owned
1,864,352 Class A x 1 =	1,864,352	74.5%
39,731 Class B x 16 =	635,696	25.5%
Total	2,500,048	100.0%

******

Class of Stock	Percentage Equity Before Recap. Plan	Percentage Equity After Recap. Plan	Percentage Point Change
A	34.5%	74.5%	40 Points increase
B	65.5%	25.5%	40 Points decrease

Loss in Class B equity = $\frac{40}{65.5}$ = 61% decrease

As a result of the recapitalization plan, Class B gave up at least 61% of its equity and veto power in matters such as capital changes. On the other hand, Class A gained 61% of Class B's equity, became vested with equity privileges, and acquired complete control of MOPAC without paying any tax on the equity gained, or giving Class B any compensation for the property and veto power taken. The $850 per Class B share came out of Class B capital account, and should have been designated a return of capital.

These percentage changes as determined are undisputed as to method of calculation, and can be found on Page 11 of the MOPAC Proxy Statement of May 8, 1973.

The dispute is two-fold:

a. That it was wrong to transfer any equity at all, or any future equity privilege from the Class B stockholder to the Class A stockholder.

b. That the amount taken cannot be accurately determined without first making an appraisal of the property under Section 19a of the ICC Act, because 61 per cent loss of Class B equity is based on 1955 property values as indicated above. Under current property values, the equity loss would be substantially greater than 61%. For an example see APPENDIX F Pages 6 and 7.

6. Plaintiff appellant, as a dissident Class B common equity bearing stockholder, seeks appraisal rights in this Honorable Court, and seeks relief which would restore him to his equivalent equity ownership in MOPAC before the new recapitalization through issuance of the proper number of shares, so as to leave his *intrinsic* ownership in MOPAC unchanged and unimpaired, as required under Amendment 5 of the United States Constitution.

Page 2 of the MOPAC Proxy Statement dated May 8, 1973, indicates that plaintiff appellant has no appraisal rights in connection with the approval and adoption of the recapitalization plan:

> "Although the General and Business Corporation Law of Missouri provides certain appraisal rights to stockholders in corporate transactions similar to those contemplated by the Plan, the Missouri Railroad Corporation Law contains no such appraisal rights. In the opinion of Messrs. Bryan, Cave, McPheeters & McRoberts, counsel to the Company, stockholders of the Company have no appraisal rights in connection with the approval and adoption of the Plan."

Plaintiff appellant believes he does have appraisal rights under the 5th Amendment of the U. S. Constitution, and relies on *Schwabacher* vs. *U.S.* 334 US 182; *Wood* vs. *U.S.* 132 F. Supp 586, and *Levin* v. *Mississippi Corp.* 386 US 162 (1967,) for remand of the decision in the Court below as to "due process" evaluation of plaintiff appellant's Class B stock.

The whole thrust of these three cases is that if a stockholder gives one good apple to a scheme of capitalization, that stockholder must receive one good apple back, and not an apple which has had 61% or more eaten by someone else.

7. Plaintiff appellant has been a dissident Class B equity bearing stockholder since the inception of this instant recapitalization plan.

a. He opposed the plan in Judge Weinfeld's Court USDC Southern District of N.Y. in 1973, *Levin* vs. *Mississippi River Corpo.* 59 F.R.D. 353, the Second Circuit Court of Appeals, *Wesson* vs. *Mississippi River Corp.* 486 F. 2d 1398 (1973) and sought in this Honorable Court in the October term 1973, a writ of Certiorari 73-663 in which the question of being bound to the class action under Rule 23 of the Federal Rules of Civil Procedure was raised. *cert. denied* 414 U.S. 1112 (1973). A rehearing was sought attacking the Class action relying on lack of jurisdiction under *Zahn* v. *International Paper* 414 US 291 (1973) *reh. denied* 415 U.S. 939.

b. He voted against the plan on June 15, 1973.

c. He attended the five days of hearings before the ICC in September 1973, testified against the plan, protested the Report and Order of the ICC service Date December 14, 1973, Finance Docket 27346, and the several orders which followed, until this avenue of relief was exhausted.

d. He then sought relief from the three-judge court U.S.D.C. District of N.J. from which this appeal is made.

Much of this previous history is now irrelevant, except to show plaintiff-appellant's efforts in the previous litigation to extricate himself from a class action suit in which he would lose 61% of his property, and to firmly establish the fact that he is a dissident Class B common equity bearing stockholder, not "a disappointed preferred stockholder," as indicated on the first line of the April 20, 1976 Opinion of the court below. (APPENDIX A Page 1.)

QUESTIONS ARE SUBSTANTIAL AND REQUIRE PLENARY CONSIDERATION

QUESTION 1:

Based upon the percentage figures contained in the MOPAC Proxy Statement, Page 11, the recapitalization plan reduces the Class B common stockholder equity from 65.5% to 25.5% on full conversion of the preferred. This is a 61% transfer of Class B common equity to Class A $5 preference on full conversion of the new preferred. (Page 7 above.) The approximate dollar amount of this transfer, based on the stockholder equity at December 31, 1972, using 1955 property values, is *$217 million.* If we assume, conservatively, that the property values doubled between 1955 and 1972, then Class B will have lost 70% of its equity and the approximate dollar amount of the transfer to Class A would be *$623 million.* (See Page 7 of APPENDIX F.) The dollar loss to Plaintiff-Appellant Wesson on his 75 Class B shares is approximately $410,000, using 1955 property values, and approximately $1,178,000 when doubling 1955 property values because of inflation as above. This transfer of equity from the Class B common as a whole, or from Appellant Wesson individually, is substantial, without further consideration.

But in addition, there is further injury in the plan. It was accomplished without evaluations of the Class B equity's intrinsic worth, and without compensation to the Class B stockholder. The $850 cash came out of the Class B stockholder capital account, but it was taxed as current income, saving Alleghany, owner of 21,243 shares, or 53% of Class B, a huge tax liability. The $217 million or more equity and equity rights transferred to the Class A was untaxed, saving MRC owner of 1,158,395 shares, or 62% of Class A, another huge tax liability. A current evaluation might show that upward of $1 billion was transferred to Class A with no tax paid. The IRS should have well over $150 million coming under this transfer of property when a proper ap-

praisal of the property is made. The recapitalization is clearly *detrimental* to the "public interest" because it is repugnant to the U. S. Constitution with regard to the investing public and protection of its property under the 5th Amendment, and the taxpaying public under the 16th Amendment. The principal of and necessity for evaluation is clearly enumerated in *Schwabacher* supra at page 199.

> "In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good."

Continuing, *Schwabacher* supra at 199, defines "fair and equitable" in a federal statute to mean that stockholder "priority is satisfied by giving each class the full economic equivalent of what they presently hold."

How could the ICC do this without a "due process" evaluation of the property under Section 19a of the ICC Act. (49 USC 19a)?

QUESTIONS 2, 3, and 4

The substance of questions 2 and 3 goes to the heart of our legal system, and the answers are found in Article VI Paragraph 2 of the United States Constitution, which reads as follows:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

The exclusive and plenary jurisdiction of the ICC under 20a (7) is derived from the U. S. Constitution; therefore the ICC must be the guardian of individual property rights, sanctity of contracts, and ex-post facto law under the U. S. Constitution. Plaintiff-appellant believes that the facts, when they are determined, will show that "the supreme law of the land" has been abused by the ICC in this instant action, and that it is the duty of this Honorable Court to again redress these abuses, (*Schwabacher* supra at 190) as was done unanimously in *Levin* v. *Mississippi Corp.* 386 US 162 (1967.)

The enormity of the substance of question 4 as a corallary to questions 2 and 3 should not be minimized. Though a majority vote in a recapitalization may be irrelevant as to dissident stockholder losing equity under *Schwabacher* supra and *Wood* supra, the question of Alleghany's vote in this instant recapitalization is raised because of the seriousness of alleged violation of the Federal Statutes by a company which controls the world's largest mutual fund complex of approximately $6 billion dollars, in order to avoid taxes. See Part II Page 11 of APPENDIX F. Furthermore, if Alleghany did not have the right to vote its stock, the recapitalization would be null and void.

QUESTION 5:

Under Rule 52 of Rules of Civil Procedure on page 29, "In an equity case, it is duty of the court to make meticulous findings".

1. Court below failed to make meticulous findings on some substantial questions of fact and law.

a. Plaintiff-appellant, in his pleadings and oral arguments, clearly addressed the court below in this equity matter as a Class B common equity bearing stockholder. On

line 1 page 1 of his Opinion, dated April 20, 1976, Judge Fisher refers to plaintiff appellant as a "disappointed preferred stockholder." (APPENDIX A.) To understand the status of the plaintiff-appellant as an equity bearer in this huge equity case is paramount.

b. On page 4 of his Opinion, Judge Fisher found "The Commission further found that the allocation of new shares (1 new preferred share for 1 share of old Class A stock, and 16 shares of new common for 1 share of old Class B, plus cash sum) is reasonable and fair in view of the present and prospective worth of MOPAC."

There has not been an evaluation of the property since 1955, so neither Judge Fisher, nor the Commission, knew the present worth of MOPAC as indicated, and *prospective worth is protected by leaving equity standing undisturbed and undiminished.* If the court below had performed its duty to make meticulous findings of *fact*, it would have ordered an evaluation of the property, particularly where both classes of stock were being extinguished by the recapitalization.

c. On the question of determining the value of Class B equity, the court below, in the opinion at the bottom of page 4, is in error on its application of *Schwabacher* vs. *U.S.* 334 US 182 (1948) with respect to book value as a measure of value of stock vs. the capitalized earnings method. Judge Fisher failed to realize that the U.S. Supreme Court remanded the case back to the Commission because they had failed in their criterion of measurement of relative values. *Schwabacher* supra 187-8.

The court below failed to understand or find that when two classes of stock are extinguished, as in this instant recapitalization, the property to which each class of stock is entitled must be evaluated, particularly when there is a financially sound and prosperous railroad involved. The

Class A was entitled to $100 first, and no more. The Class B was entitled to all the remaining property after the Class A received $100. It was on the basis of *what was in the stockholders' account* that the MOPAC said in its proxy statement of May 8, 1973, on page 11, that Class A owned 34.5% of the equity, and Class B owned 65.5% as of December 31, 1972, without bringing the stockholder account up to date. As noted above, this was based on a 1955 evaluation of property values.

The railroad charter tells a stockholder what he owns, and current appraisal of the intrinsic property tells the stockholder the value of what he owns. Consequently, the court below should have found the Commission was erroneous and arbitrary for failing to order an evaluation of the railroad equity under 49 USC 19a in order to establish what belonged to each class of stock, so that after the recapitalization, each class would receive exactly what they contributed, as commanded by *Schwabacher* supra and *Wood* supra, and as protected by this Honorable Court in *Levin* v. *Mississippi* Corp. 386 US 162 (1967.)

d. The court below, in the Opinion on Page 3, addressed itself to a deadline for settlement of the recapitalization agreement as being December 31, 1973, and used the excuse that time was of the essence, to accept the truncating of the judicial process in hearings before the ICC. Administrative Law Judge Gibbons conducted five days of hearings at the ICC, and did not make a decision. Instead, three commissioners of Division 3, who were not at the hearings, made the decision. The ICC report and orders of Division 3 was made with service and effective date of December 14, 1973, instead of the normal time lapse of twenty days between service and effective date, as provided by Section 17 (5) of the ICC Act. The court below, in excusing this arbitrary legal process, noted without further comment, that the recapitalization was consummated on January 21, 1974.

This was 21 days after the deadline the court cited. The earlier deadline frustrated dissenting Class B stockholders, yet could be extended at the discretion of the parties and was extended at their pleasure.

e. A reading of APPENDIX F and the remaining record, in juxtaposition with the Opinion of the court below, will indicate that numerous important questions raised have been irgnored, particularly with respect to Alleghany's alleged violation of the Federal Statutes 49 USC 5(4), together with the officers and directors of MOPAC and MRC, who personally benefited *enormously* from the huge transfer of Class B equity to Class A, allegedly in violation of 49 USC 20a (12).

CONCLUSION

The court below has not, nor has the ICC, nor have any of the courts in all of the previous litigation which started in 1967, granted and ordered a due process evaluation of the MOPAC Class B equity bearing property under Section 19a of the Interstate Commerce Act in accordance with the 5th Amendment of the U. S. Constitution, and in keeping with *Schwabacher* supra and *Wood* supra, so as to establish the one basic *fact* on which the whole controverys rests; *the value of the Class B equity.*

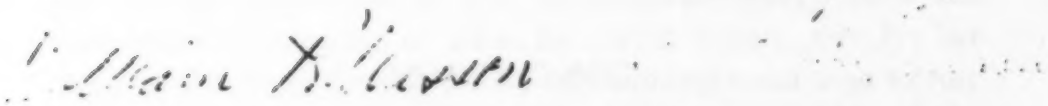
Plaintiff-appellant only wishes to take intrinsically from the recapitalization that which he gives intrinsically to the recapitalization, rather than have his equity reduced by 61% or more, as it would be without an evaluation. He does not want cash, but merely the same equity standing with shares of common stock which he had before the recapitalization; and plaintiff-appellant knows that this is just and reasonable in this instant recapitalization of a financially sound, efficiently equipped, and well operated railroad.

Plaintiff-appellant prays for a due process evaluation of

his Class B equity bearing common stock, so he may receive the full economic equivalent of what he previously held, and extricate himself from a plan similar to the 1967 Plan which, in the words of Justice Hugo S. Black, "under such values, is like exchanging four rabbits for one horse." *Levin* vs. *Mississippi River Corp.* 386 US 162 at 169.

Dated: Mantoloking, N.J.
September 24, 1976

Respectfully submitted,



WILLIAM R. WESSON
Plaintiff-Appellant, Pro Se

JOHN CHARLES VAIANI
Plaintiff-Appellant, Pro Se

CERTIFICATE OF SERVICE

I, William R. Wesson, pro se, Petitioner, joined by John Charles Vaiani, pro se, also a Petitioner herein, do hereby certify that three copies of the above and foregoing Petitioners' Statement have been deposited in the United States mail, postage prepaid, on the 27th day of September, 1976 to the following addressees in accordance with Rule 33 of the Court:

Attorney General of the United States
Washington, D. C. 20544

Ronald L. Reisner, Esquire
Assistant United States Attorney
Federal Building
Trenton, New Jersey 08608

OFFICE OF RECEIVED SEP 27 1976 SOLICITOR GENERAL

John H. D. Wigger, Esquire
Anti-Trust Division
Department of Justice
Washington, D. C. 20530

Hanford O'Hara, Esquire
Office of General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

SEP 27 1976

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William R. Wesson, Pro Se
WILLIAM R. WESSON, Pro Se
Plaintiff-Appellant

APPENDIX A

UNITED STATE DISTRICT COURT
DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION :

JAMES C. GABRIEL, Pro Se, :
JOHN CHARLES VAIANI, Pro Se, :
WILLIAM R. WESSON, Pro Se :

Plaintiffs :

vs. :

UNITED STATES OF AMERICA and :
INTERSTATE COMMERCE COMMISSION, :

Defendants :

- and - :

MISSOURI PACIFIC RAILROAD COMPANY, :

Defendant-Intervenor :

CONSOLIDATED
CIVIL ACTIONS

74-471
74-470
74-469

OPINION

APPEARANCES: JAMES C. GABRIEL, Pro Se
JOHN CHARLES VAIANI, Pro Se
WILLIAM R. WESSON, Pro Se

THOMAS E. KAUPER, ESQ.,
Asst. Attorney General
By: JOHN H. D. WIGGER, Esq.,

- and -

JONATHAN L. GOLDSTEIN, ESQ.,
United States Attorney,
By: RONALD L. REISNER, ESQ.,
For the United States of America

FRITZ R. KAHN, ESQ.,
General Counsel,
By: HANFORD O'HARA, ESQ.,
For Interstate Commerce Commission,

MILTON ROSENKRANZ, ESQ.,
LEON LEIGHTON, ESQ.,
For the Defendant-Intervenor

BEFORE: HUNTER, Circuit Judge
WHIPPLE and FISHER, District Judges

FISHER, District Judge

Plaintiffs, three disappointed preferred stockholders of the Missouri-Pacific Railroad Company, (hereinafter MoPac), brought this action to set aside and annul an order of the Interstate Commerce Commission which granted authority to MoPac under the Interstate Commerce Act, 49 U.S.C. 20a to issue securities in accordance with a plan submitted to the I.C.C. to recapitalize. Plaintiffs and others had opposed the plan before the I.C.C. Jurisdiction is conferred by virtue of §§1336(a), 1398(a), 2284, 2321-2325, 2401 of Title 28 U.S.C. and §1009 of Title 5. The purpose of the suit is to have this court set aside the determination of the I.C.C.

The terms of the plan of recapitalization have previously been settled and approved and reported in a comprehensive opinion and judgment by Judge Weinfeld in a class action brought by Class B stockholders of MoPac, to which class plaintiffs here belong. *Levin v. Mississippi River Corp.*, 59 F.R.D. 353, (S.D.N.Y. 1973), aff'd. sub. nom. *Wesson v. Mississippi River Corp.*, 486 F.2d 1398 (2d Cir. 1973), *cert. denied* 414 U.S. 1112 (1973).

Upon reorganization in 1956 under Section 77 of the Bankruptcy Act (11 U.S.C. §205), MoPac, a Missouri corporation, was authorized to issue two classes of stock: Class A (issued to former preferred stockholders) and Class B (issued to former common stockholders). Class A stockholders had certain preferences as to the payment of dividends and in the events of dissolution of the company. Each share of both types had one vote: 1.9 million shares (98%) were held by Class A stockholders, and 40,000 shares (2%) were held by Class B stockholders. Class A holders thus had operational control over the corporation, but on mergers, consolidations or reorganizations involving issuance of additional stock or the alteration of rights of the respec-

tive Classes, a majority of each Class was required to approve the action proposed. This situation caused a conflict between the two Classes, a conflict aggravated by the fact that Mississippi River Corporation, (Mississippi), had by 1963 acquired a majority of the Class A shares, while Alleghany Corporation (Alleghany) held a majority of the Class B shares.

In December of 1967 a class and derivative action was commenced on behalf of all Class B stockholders (Alleghany and others) against MoPac, Mississippi, and three directors of MoPac, to compel the payment of higher dividends, past and future. In that action, *Levin v. Mississippi River Corp.*, 59 F.R.D. 353 (S.D.N.Y.1973) *aff'd mem.* 486 F.2d 1398 (2d Cir. 1973) *cert. denied* 414 U.S. 1112, 38 L.Ed.2d. 739, *reh. denied* 415 U.S. 939, it was also alleged that certain defendants had engaged in a conspiracy to "freeze out" Class B stockholders in various ways (improperly limiting dividends etc.) and that such acts were also in violation of the Securities Exchange Act and rules thereunder. Plaintiffs sought various types of relief from the Court, including an order compelling payment of higher past and future dividends.

After extensive discovery was undertaken by the parties in the succeeding months and years, during which time efforts at settlement were also pursued, a settlement was finally reached and presented to the court,[1] on the basis of a restructured capitalization which would, if consummated, eliminate the controversy between Class A and Class B shareholders. In March 1973, the district court approved the settlement (59 F.R.D. at 373) and its decision was upheld on appeal, (486 F.2d 1398) and certiorari was denied.

Under the proposed settlement, which the court approved, a majority of the minority Class B stockholders could reject the plan (59 F.R.D. at 374). Pursuant to the proposed settlement, and promptly following the court's

decision, MoPac, in April 1973, filed its application with the Commission under Section 20a of the Interstate Commerce Act, 49 U.S.C. §20a, for authority to issue the various stocks called for in the recapitalization plan. After notice of the application was given to all MoPac stockholders, hearings were held, at which plaintiffs herein and others expressed their opposition to MoPac's application.

At a special meeting of MoPac stockholders, held on June 15, 1973, 86.5% of the outstanding shares of Class A stock were voted in favor of the recapitalization plan and 83.4% of the outstanding shares of Class B stock were voted in favor of the recapitalization plan. Among the minority shares in both classes (i.e. those shares not owned by either Mississippi or Alleghany), 95.5% of Class A shares present and voting were voted in favor of the plan and 84.7% of the Class B shares present and voting were voted in favor of the recapitalization plan.

On December 14, 1973 Division 3, consisting of three Commissioners, issued its report and order granting MoPac's application. The order was made effective immediately, as time was of the essence in view of the deadline set forth in the settlement agreement. On December 28, 1973 the Commission issued an order denying petitions of plaintiffs and others to stay the effective date of the December 14, 1973 order. On January 23, 1974 the Commission issued its order denying petitions for reconsideration of the December 14 order and on March 4, 1974, the Commission issued an order denying petitions seeking a finding that an issue of general transportation importance was involved. On January 21, 1974 the MoPac plan of recapitalization was consummated. The instant actions were commenced on April 4, 1974 while the companion case in the Eastern District of Missouri, Labelle Gillespie v. United States, et al., Civil Action No. 74-239 C(2) was commenced on April 2, 1974. The Three-Judge Court which was convened in Labelle Gillespie v. United States, et al., supra, stated in their opinion:

"The amendment to MoPac's Articles of Association was made in conformity to Missouri law. MoPac's Articles of Association expressly provide that the rights of all holders of capital stock of the company are subject to change, alteration, abrogation, or repeal in any matter permitted by the laws of Missouri. And Section 388.220, R.S. Mo., specifically authorizes modifications of the stock structure of railroad companies such as were here made. Hence, since far more than the requisite number of shareholders of each class of stock has voted in favor of the changes, the question before the Interstate Commerce Commission on the Section 20a application was a very narrow one of whether the issuance of the new securities to effectuate the plan and amendment to the Articles of Association would be 'for some lawful object within [MoPac's] corporate purposes and compatible with the public interest', and would be 'reasonably necessary and appropriate for such purpose'."

This court's function is limited. The decisions of independent regulatory agencies are generally sustained if within the authority of the agency's statutory power and are based upon appropriate findings which are in turn supported by substantial evidence. *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 619-621 (1966); *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535 (1945). This standard applies in cases involving Commission decisions under §20a of the Act. *Chicago S.S. and S.B.R.R. v. United States*, 221 F.Supp. 106, 109 (N.D. Ind. 1963). "The test of judicial review for an order of the Commission is whether the action of the Commission is supported by 'substantial evidence' on the record reviewed as a whole." *Metropolitan Shipping Agents of Illinois, Inc. v. Interstate Commerce Commission*, 342 Supp. 1266, 1268 (D.N.J. 1972).

The Commission's review in the MoPac recapitalization was limited under Section 20a(2) of the Act to a determina-

tion of whether the issuance of securities in connection with the plan would be "***for some lawful object within [the carrier's] corporate purposes, and compatible with the public interest..." and "...is reasonably necessary and appropriate for such purpose".

The Commission, in an exhaustive report, found that the recapitalization was the result of extensive arms-length bargaining by MoPac, Mississippi and Alleghany and was analysed by independent financial and investment advisers specializing in corporation and transportation finance. The I.C.C. further noted that the settlement was approved by the court in the *Levin* case, after due consideration being given to the rights and possible remedies of each class of stockholders. The plan of recapitalization had been approved by a majority of each class of stockholders and by a majority of the minority stockholders of each class. The Commission further found that the allocation of new shares (1 new preferred share for 1 share of old Class A stock, and 16 shares of new common for 1 share of old Class B plus a cash sum) is reasonable and fair in view of the present prospective worth of MoPac. The I.C.C. summarized in their report (p. 59) as follows:

> "In our opinion, the proposed plan is not contrary to the public interest. In fact, considering the benefits to each class of stock and the advantages to the carrier, it is our conclusion that the plan of recapitalization will be in the best interest of the stockholders and the carrier and will be compatible with the public interest."

The benefits of the recapitalization plan to MoPac include the elimination of the old class voting system and the dividend conflict which caused considerable dissension in the past and the fact that the Mississippi River Corporation would own a majority of both preferred and common stocks, thereby eliminating the old Class B veto power. As

a result, MoPac will have greater management flexibility and stability and MoPac will be in a better position to consider and be considered for mergers and consolidations in the future.

As to the main contention of the plaintiffs asserting that they were unlawfully deprived of the value of their Old Class B stock on the theory that the "book value" of the Class B stock was almost $9,000 a share, the I.C.C. pointed out that book value cannot be the measure of fair value of stock; rather, earnings must be considered and the capitalized earnings method is the proper means of analysis. See, *Schwabacher v. United States*, 334 U.S. 182 (1948); *Boston & M.R. Securities Modification*, 275 I.C.C. 397, 431-33 (1950); *Levin v. Mississippi River Corp., supra*, at 369.

As to the other contentions of the plaintiff, they do not merit extensive comment since the Commissions's findings on these issues were also warranted.[2]

We do not find any reason to differ with those findings. Our sole function is to determine whether the decision of the Commission is consistent with the public interest and lawful. We agree that it is and affirm those findings and decision.

Therefore, the order of the Commission questioned herein should be and is hereby affirmed.

Submit an Order.

Dated: April 20, 1976.

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JAMES C. GABRIEL, Pro Se,
JOHN CHARLES VAIANI, Pro Se,
WILLIAM R. WESSON, Pro Se,

Plaintiffs

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants

-and-

MISSOURI PACIFIC RAILROAD COMPANY

Defendant-Intervenor

CONSOLIDATED CIVIL ACTIONS

74-471
74-470
74-469

JUDGMENT

This matter, having been opened to the Court by James C. Gabriel, John Charles Vaiani and William R. Wesson, plaintiffs pro se, in the presence of Jonathan L. Goldstein, United States Attorney for the District of New Jersey, Ronald L. Reisner, Assistant United States Attorney appearing, Thomas E. Kauper, Assistant Attorney General of the United States, John H. D. Wigger, Esquire, appearing, Fritz R. Kahn, General Counsel for the Interstate Commerce Commission, Benford O'Hara, Esquire appearing, Milton Rosenkranz, Esquire and Leon Leighton, Esquire appearing, and the Court having considered all of the documents filed as well as the briefs and oral argument of counsel and the Court having filed an opinion on April 20, 1976 and for good cause shown;

It is on this 7th day of April, 1976

ORDERED and ADJUDGED that final order of the Interstate Commerce Commission questioned herein be and the same hereby is AFFIRMED without costs.

JAMES HUNTER, III
UNITED STATES CIRCUIT JUDGE

LAWRENCE A. WHIPPLE
CHIEF, UNITED STATES DISTRICT JUDGE

LAWSON L. FISHER
UNITED STATES DISTRICT JUDGE

ORIGINAL FILED
APR 20 1976
ANGELO W. LOCASCIO, CLERK

new common stock (339,888 shares). If more than 400,000 shares are tendered, Mississippi may purchase the shares on a pro rata basis; this would require a cash payment by Mississippi of at least $40,000,000;

(7) all claims asserted in this action and any other claims against the defendants which are based upon or arise from any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, will be dismissed with prejudice;

(8) fees awarded to plaintiffs' attorney's will be paid by MoPac and Mississippi.

If the recapitalization and tender offer are not consummated by December 31, 1973, the settlement agreement would be terminable at the option of Alleghany, Mississippi or MoPac.

2. As the court stated in *Labelle Gillespie v. United States et al.*, Civil Action No. 74-239 C(2):

"Other contentions of plaintiff, rejected by the Commission, included (1) that an 'immutable contract was created by the 1956 plan of reorganization could not be altered over the dissent of a single Class B shareholder; (2) that the settlement plan approved by Judge Weinfeld has a 'congenital defect' in that the *Levin* suit for dividends was 'illegally' converted into a suit for recapitalization; (3) that the settlement plan was forced upon the Class B shareholders by 'court fiat'; (4) that the proxy statement for the stockholders' meeting was false and misleading; and (5) that MoPac, Mississippi and their respective Boards' Directors were guilty of conspiracy, fraud and deceit.

We agree that the Commission's findings on these issues were warranted. So, too, we find no merit to plaintiffs further assertion that Alleghany 'sold out' the other Class B stockholders by entering into the settlement agreement."

FOOTNOTES

1. The terms of the proposed settlement were described by the court as follows (59 F.R.D. at 360-361):

> (1) each share of Class A stock would be converted into one share of $5 cumulative preferred stock, with a liquidating preference of $100 per share, convertible into one share of new common after one year following I.C.C. authorization of the issuance of new securities and redeemable at the option of MoPac for $100 per share, after December 31, 1975. This would require the issuance of 1,864,052 shares of the new stock to the present holders of the Class A stock, of which Mississippi would be entitled to receive 1,158,395 shares;
>
> (2) each share of Class B stock would be converted into sixteen shares of new common stock and $850 cash. This would require the issuance of 635,696 shares of new common stock to the present holders of Class B stock, of which Alleghany would be entitled to receive 339,888 shares; this would require a cash payment by MoPac of $33,771,350;
>
> (3) both preferred stock and common stock would have one vote per share;
>
> (4) the Plan and amendment would have to be approved by 75% of the outstanding shares of each class of MoPac stock, including a majority of the shares of each class other than those held by Mississippi and Alleghany — that is, a majority of the minority stockholders of each class;
>
> (5) the issuance of the new shares would have to be approved by the Interstate Commerce Commission;
>
> (6) upon such approvals, Mississippi is required to make a cash tender offer to all Class B stockholders for at least 400,000 shares (approximately 63%) of the new common stock, at $100 per share, and Alleghany (but not the minority B shareholders) must tender all its

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

WILLIAM R. WESSON - Pro se Plaintiff vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION Defendants MISSOURI PACIFIC RAILROAD COMPANY Intervening defendants	CIVIL ACTION No. 74-469 NOTICE OF MOTION FOR RE-ARGUMENT UNDER RULE 12 I, OF THE GENERAL RULES, TO BE SERVED AND FILED WITHIN 14 DAYS AFTER THE FILING OF THE COURT'S ORDER OR JUDGMENT ON MAY 6, 1976

TO: THE CLERK OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

SIR:

PLEASE TAKE NOTICE, that this is a Motion by WILLIAM R. WESSON Pro Se, Plaintiff, for re-argument under Rule 12 I, of the General Rules, of the final order of the Interstate Commerce Commission which was affirmed without costs by Judgment, filed May 6, 1976, at the Clerk's Office of the United States District Court, District of New Jersey, over the signatures of James Hunter, III, United States Circuit Judge, Lawrence A. Whipple, Chief United States District Judge, and Clarkson S. Fisher, United States District Judge, whose OPINION dated April 20, 1976 does not address itself to the proper class of dissident stockholder appearing before the Court, nor does it address itself to important legal issues raised in the complaint, arguments, and briefs submitted by the Plaintiff.

Dated: Ocean County, NJ
This 19th day of May 1976

Respectfully submitted,

William R. Wesson

William R. Wesson, Pro Se,
1550 Ocean Avenue
Mantoloking, New Jersey 08738
Phone (201) 892-5709

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM R. WESSON - Pro se
Plaintiff

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Defendants

MISSOURI PACIFIC RAILROAD COMPANY

Intervening defendants

Civil Action No. 74-469
AFFIDAVIT IN SUPPORT OF MOTION

For re-argument under Rule 12 I, of the General Rules to review its Opinion of April 20, 1976 and to reconsider its Judgment filed May 6, 1976.

STATE OF NEW JERSEY)
COUNTY OF OCEAN) SS.:

WILLIAM R. WESSON, Pro Se, Plaintiff, moves this Honorable Court to review its *NOT FOR PUBLICATION* Opinion of April 20, 1976 and to reconsider its Judgment filed May 6, 1976 for Re-argument under Rule 12 I of the General Rules, for the following reasons:

ERROR IN STATUS OF PLAINTIFF

1. Plaintiff is a dissident Class B, *common, equity bearing* stockholder of the Missouri Pacific Railroad (MOPAC), not a "disappointed preferred stockholder," as indicated in the first sentence of the Opinion dated April 20, 1976.

2. Plaintiff has remained in dissident Class B status during all proceedings related to this instant recapitalization,

vested there before. (For calculations see page 7 of Plaintiff's Supplement to Brief filed 2/3/76.)

4. Such an evaluation does not have the effect of demolishing the Recapitalization Plan for those who accepted its provisions and turned in their Class B stock for the new common stock. The evaluation will satisfy the constitutional rights of the undersigned dissident shareholder and allow the Internal Revenue Service to collect the capital gains tax on the values transferred to the Class A stockholders.

Respectfully submitted,

William R. Wesson, pro se
1550 Ocean Avenue
Mantoloking, New Jersey 08738
May 19, 1976

minority Class B stockholders because of *Jones*, supra, it also lacked the power to vote its 21,243 shares of Class B stock for this instant recapitalization plain in view of *Jones* supra, *Wood* supra, and Section 5(4) of the Interstate Commerce Act.

DUE PROCESS EVALUATION OF CLASS B STOCK SOUGHT

1. While the Court's Opinion of April 20, 1976, does not address itself to the numerous errors and arbitrary acts of the Interstate Commerce Commission cited in the Plaintiff's complaints, briefs and arguments, it is the purpose of this request for re-argument to concentrate on due process evaluation of the Plaintiff's Class B *common equity bearing* stock, and Plaintiff's right to such an evaluation thereof under Article I, Section 9 and 10, and the 5th Amendment of the United States Constitution.

2. Because Plaintiff continues to seek a due process evaluation of his Class B common equity bearing stock in order to prevent the loss of 60% to 70% of its value to the Class A stockholders, it is requested that the Court reargue that portion of the case which pertains, first to required evaluation of dissident stockholder equity in a financially healthy railroad, and second, to the elimination of Alleghany's trusteed stock in the voting procedure.

3. When this Court or some other court orders a due process evaluation of the Class B stock by the ICC, that action will have as its corollary the effect of allowing the Internal Revenue Service of the United States Government to pick up approximately $100 million in capital gains taxes from the old Class A stockholders, because such evaluation will show the true values in the class B stock which were transferred to the Class A stock; namely, $623 million additional equity plus the future equity ownership or common stock status awarded to the Class A stock which was not

including voting against the plan on June 15, 1973, and has consistently prayed for the same relief before all courts, including this court; i.e., that his *equity ownership* in MOPAC remains undiminished and unimpaired by this recapitalization through a court ordered, due process evaluation of his Class B common equity bearing stock.

CERTAIN MATTERS OVERLOOKED AND CONTROLLING DECISIONS NOT PROPERLY CONSIDERED IN OPINION

1. It is clearly unconstitutional for one class of stockholder to take the substance of another class of stockholder in a financially sound railroad. *Wood vs. United States* 132 F Supp 586 (1955.) (See Part IV Page 15 of Plaintiff's Supplement to Brief filed 2/3/76.)

2. As a result of Alleghany's purchase and control of Jones Motor in violation of Section 5(4) of the Interstate Commerce Act, Alleghany's Class B MOPAC was kept in trust under the continuing jurisdiction of the ICC, (109 MCC 333 at 350, 356-7, Exhibit A of Plaintiff's supplement to Brief filed 2/3/76); and it was not proper for Alleghany to vote its Class B stock for this instant Recapitalization Plan without prior permission from the ICC. *Wood vs. United States* Supra Page 597; hence, the Recapitalization Plan did not receive the Class B majority vote on June 15, 1973, required under the "1956 Agreed Plan" as upheld in *Levin v. Mississippi River Corp.* 368 US 162. (Page 13 Plaintiff's Supplement to Brief filed 2/3/76.) With Alleghany's 21,243 votes eliminated, only 11,905 of the 39,731 Class B shares outstanding, or 30% of the Class B stock, voted for the Plan. This is not the required majority, nor is it the 83.4% majority of outstanding Class B shares as indicated on page 2 of this Court's opinion of April 20, 1976, or on page 19 of the ICC order dated Dec. 6, 1973. Alleghany not only lacked a mutuality of interest with the

State of New Jersey
County of Ocean

William R. Wesson, being duly sworn, deposes and says that deponent is the plaintiff, pro se, in the within action; that deponent has read the foregoing Affidavit and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Be it remembered that on this 19th day of May 1976 personally appeared before me, a notary public of New Jersey, William R. Wesson, to me known and known to me to be the individual described herein and who has sworn to and executed the foregoing Affidavit, pro se, and he acknowledged to me that he executed the same.

Edwin A. Fisher
A Notary Public of New Jersey

NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 28, 1977

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of May 1976 served this brief upon all parties of record in this proceeding by mailing a copy of this by first class mail, properly addressed to each party.

Attorney General of the United States
Washington, D. C. 20544

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Assistant United States Attorney
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Trenton, New Jersey 08608

John H. D. Wigger, Esquire
Anti-Trust Division
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Leon Leighton, Esquire
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John Charles Veiani
1313 River Avenue
Point Pleasant, N.J. 08742

James C. Gabriel
RD 1, Box 16
Colts Neck, N.J. 07722

William R Wesson
WILLIAM R. WESSON, Plaintiff

MAY 19 1976

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[illegible]

[illegible]
WILLIAM R. WEAVER, [illegible]

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants

-and-

MISSOURI PACIFIC RAILROAD COMPANY

Defendant Intervenor

[illegible]

74-471
74-470
[illegible]

O R D E R

(Judge Hunter)
(Judge Whipple)
(Judge Fisher)

This matter, having been opened to the Court by James C. Gabriel, John Charles Vaiani and William R. Weaver, plaintiffs pro se, in the presence of Jonathan L. Goldstein, United States Attorney for the District of New Jersey, Ronald L. Reisner, Assistant United States Attorney appearing, Thomas E. Kauper, Assistant Attorney General of the United States, John H. D. Wigger, Esquire, appearing, Fritz R. Kahn, General Counsel for the Interstate Commerce Commission, Hanford O'Hara, Esquire appearing, Milton Rosenkranz, Esquire and Leon Leighton, Esquire appearing, and the Court having considered all of the documents filed and the Court having filed a memorandum dated May 29, 1976 and for good cause shown;

It is on this 22nd day of June, 1976

ORDERED that each plaintiff's motion for rearrument herein be and the same hereby is DENIED without costs.

JAMES HUNTER, III
UNITED STATES CIRCUIT JUDGE

LAWRENCE A. WHIPPLE
CHIEF, UNITED STATES DISTRICT JUDGE

CLARKSON S. FISHER
UNITED STATES DISTRICT JUDGE

FILED

JUN 29 1976

AT 8:30 M

ANGELO W. LOCASCIO
Clerk

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

WILLIAM R. WESSON - Pro se Plaintiff vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION Defendants MISSOURI PACIFIC RAILROAD COMPANY Intervening defendants	CIVIL ACTION No. 74-469 NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT ORDER signed JUNE 22, 1976 and filed JUNE 29, 1976

ORIGINAL FILED
JUL 28 1976
ANGELO J. LOCASCIO, CLERK

TO: THE CLERK OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

SIR:

PLEASE TAKE NOTICE, that the undersigned plaintiff, WILLIAM R. WESSON, Pro se, hereby appeals to the United States Supreme Court the order of the United States District Court, District of New Jersey, dated June 22, 1976, and filed June 29, 1976, in the above captioned case, Civil Action No. 74-469.

Although the order was signed by the Court and filed as aforementioned, notice of filing on June 29, 1976 was not received by the undersigned plaintiff from the Court. The filing was discovered by a colleague who made several trips to Trenton, New Jersey, to query the Court on the status of this and other orders of the Court.

Appellant is appealing from each and every order, ruling, letter opinion, memorandum, upon which the judgment or order was based.

Plaintiff - Appellant Pro se is seeking a due process-of-law evaluation of his Missouri Pacific Railroad Class B equity bearing common shares as provided by the Constitution and laws of the United States.

Dated: Ocean County, New Jersey
this 26th day of July 1976

Service: Clerk of the Court,
original and
seven copies

Respectfully submitted,

William R. Wesson

William R. Wesson, Pro se,
1550 Ocean Avenue
Mantoloking, New Jersey 08738
Phone: (201) 892-5709

APPENDIX E-1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN CHARLES VAIANI - Pro Se Plaintiff v. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION Defendants MISSOURI PACIFIC RAILROAD COMPANY Intervening Defendants	)	Civil Action No. 74-470 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF APERICA FOR MY ABOVE CAPTIONED CASE.

TO: The Clerk of the United States District Court,
District of New Jersey

SIRS:

The undersigned John Charles Vaiani, Pro Se, hereby appeals to the Supreme Court of the United States of America for his above captioned case, Civil Action No. 74-470.

Appellant is appealing from each and every order, ruling, letter opinion, memorandum, upon which the judgment or order was based upon.

Plaintiff, Pro Se, is seeking to get a due process of law evaluation of his Class "B" equity bearing Missouri Pacific Railroad common shares according to the Constitution and the laws of the United States.

Respectfully submitted,

John Charles Vaiani

John Charles Vaiani, Pro Se
1313 River Ave.
Point Pleasant, N.J. 08742

Dated: July 26, 1976
Ocean County, N.J.

Phone: 201-892-8921

Service to: Clerk of the Court (Original and seven copies)

ORIGINAL FILED

JUL 28 1976

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM R. WESSON - Pro se
Plaintiff
vs.
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION
Defendants
MISSOURI PACIFIC RAILROAD COMPANY
Intervening defendants

Civil Action No. 74-469
SUPPLEMENT TO BRIEF
filed August 6, 1975
for
REVIEW OF ADMINISTRATIVE ACTION OF THE INTERSTATE COMMERCE COMMISSION
FINANCE DOCKET #27346

SUPPLEMENT TO BRIEF

Pursuant to the orders of this Honorable Court at oral argument on August 6, 1975, and extensions of time thereafter to file a supplement to his brief, plaintiff hereby submits the following:

PART I

SECURITIES AND EXCHANGE COMMISSION INVESTIGATION OF MISSOURI PACIFIC RAILROAD COMPANY PROXY STATEMENT OF MAY 8, 1973 FOR POSSIBILITY OF HAVING DEFRAUDED THE MOPAC STOCKHOLDERS HAS BEEN INITIATED

1. Attorney Leighton for defendant MOPAC argued on pages 85 through 91 of the record of proceedings on August 6, 1975 before this court that by vote the stockholders properly approved the recapitalization plan. However, he may *not* have known that a request has been made by a MOPAC Class B stockholder for an investigation by the

Securities and Exchange Commission of the filing and interstate communication of the MOPAC Proxy Statement of May 8, 1973, (Docket No. 20) on which the vote was based under Section 13 (b) of the 1934 Act, for violation of SEC Rule 10b-5 which states in part "... it shall be unlawful to omit to state a material fact in connection with the purchase or sale of any security," and for fraudulent interstate transactions under Section 17 of the 1933 Act which states:

Fraudulent Interstate Transactions

Sec. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly -

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, de-

scribes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

2. Plaintiff believes that the above MOPAC May 8, 1973 Proxy Statement (Docket #20) which was used to solicit the stockholders votes was fraudulent, and violated the provisions of the above-mentioned anti-fraud SEC Act and Rules, for the following reasons, some of which have been outlined in previous submissions to this Court, but are summarized here for the convenience of the Court:

a. No Deliniation of Plaintiff's Litigation

On March 26, 1973 the undersigned plaintiff commenced an action before Judge Edward Weinfeld in 67 CIV 5095 USDC So. Dist. of New York to amend his judgment to allow dissident Class B stockholders to opt out of this instant recapitalization plan. This action was actively pursued through the Court of Appeals and up to the United States Supreme Court, with a final Petition for Rehearing on January 9, 1974. Plaintiff's action in Judge Weinfeld's court commenced approximately six weeks before the Proxy Statement was circulated, yet *it was not delineated in the Proxy document.* MOPAC tried to finesse this omission by sending the stockholders an incomplete and belated letter relating to plaintiff's appeal. This letter, dated June 6, 1973, reached the stockholders during the week before, and too late to effect the June 15, 1973 vote. Most voting stockholders had already submitted their proxies before the letter was received, particularly those stockholders who had to vote through an institution, brokerage firm, or a nominee. The vote was predominately in this type of

channel, and it was later found that there were cases where such institution, brokerage firm, or nominee did not follow the instructions of the stockholder.

b. Failed to Show Alleghany's *Non-Mutuality* of Interest with other Class B Stockholders in Recapitalization Plan.

Alleghany, the majority Class B stockholder, could not act as bargainer, as Alleghany did not have a mutuality of interest with the other Class B stockholders because Alleghany had to divest itself of Class B stock, since Alleghany was in violation of Section 5(4) of the Act. (*Jones Motor* - 109 MCC 333 at 350 and 356.) (Exhibit A attached to court copies only.) Alleghany had an overriding self interest of avoiding a 70% penalty tax by being finally considered a motor carrier under ICC jurisdiction, even though it controls "Investors Diversified Services, which is the largest mutual fund complex in the United States, with assets in excess of $6 billion." *(Inadequacies of Protection for Investors in Penn Central and other ICC-Regulated Companies - Staff Study for the Special Sub-committee on Investigations of the Committee on Interstate and Foreign Commerce, H.R. 92nd Congress July 1971 Staggers Committee Govt. Print. O. 59-2970 Pages 36-38.)* Instead, the Proxy Statement endeavored to show a mutuality of interest using the aura of Judge Weinfeld's court and opinion on page D-9 and D-10 (Docket #20.)

c. No Mention of Plaintiff Robert Levasseur's Conflict of Interest with other Class B Stockholders.

Plaintiff Robert LeVasseur, in 67 CIV 5095 USDC Southern District of New York was not only a MOPAC Class B stockholder, but a substantial Class A stockholder, and as such did not have a mutuality of interest with the other Class B stockholders, because Class A stockholders were to become recipients of 61% or more of the Class B equity. This conflict of interest was not mentioned in the Proxy Statement.

d. Misrepresents Relative Rights of Class A and Class B Stockholders

Proxy Statement misrepresents the preferences, qualifications, limitations, restrictions, and special or relative rights of the Class A and Class B stockholders under the 1956 "Agreed Plan" of reorganization (290 ICC 477) using the aura of the USDC Southern District of New York to do so.

On Page D-10 of Proxy Statement (Docket No. 20) Judge Edward Weinfeld writes in his opinion, "Another Countervailing factor which cannot be disregarded is that the Class A stock, while non-cumulative, is entitled to receive dividends out of retained earnings in each year even if current earnings for a particular year may be insufficient to cover dividend requirements on the Class A stock. Consideration of the objectors' contention with respect to the value of their stock cannot ignore these elements." Plaintiff has shown on page 5 in his brief, filed August 6, 1975, that under the final "Agreed Plan" *further participation in earnings by Class A common beyond a $5 maximum dividend if earned and declared in any one year was eliminated.* (290 ICC 477 at 597 and 598.)

On Page D-2 of Proxy Statement (Docket No. 20) Judge Weinfeld in footnote (2) further misrepresents the relative rights of the Class B to the Class A by omitting an important part of a quotation by ICC Commissioner Mahaffie. The omission immediately before the footnote quotation was as follows:

> **Another serious defect is the proposed "B" stock. This is intended to give recognition to the old common. That common has, at most, only a nuisance value if the claims prior to it are to be fully met. It is proposed to award to it only a small amount in actual par value but *to make it the residuary beneficiary of any future prosperity the property may enjoy.* (290 ICC 477 at 624-25) Emphasis supplied.**

The omission of the above sentences materially altered the understanding of the rights of and the whole essence of the Class B stock, and it is this future properity that the property has enjoyed which the recapitalization plan now transfers from the Class B to the Class A.

Judge Weinfeld, in misconstruing the rights of the Class A stock, could not have been familiar with this most important section of the "1956 Agreed Plan," or he made a serious mistake and thereby the aura of the court was used to misinform and mislead the voting stockholders.

e. Misrepresents Amount of Equity Transferred from Class B to Class A Because of Failure to Evalute Property under Due Process of Law According to MOPAC "1956 Agreed Plan."

Page 11 of Proxy Statement shows that Class B equity will be reduced fro 65.5% to 25.5%, while Class A equity will be increased from 34.5% to 74.5%, upon full conversion of the new preferred, resulting in a 40 point change, or a transfer of 61% of Class B equity to Class A; however, this was based upon a 1955 property evaluation, *not* 1973 when the vote was being solicited.

Page 21, Footnote 1 of the MOPAC 1972 Annual Report indicates, "Properties are stated at estimated original cost, primarily determined as of January 1, 1955 by Interstate Commerce Commission valuation, plus additions and betterments at cost and less retirements since the dates of valuation..." "At December 31, 1972 and 1971 conslidated non-depreciable properties, including land and land rights, were approximately $545,000,000."

It is reasonable and conservative to state that these undepreciated properties have doubled in value since 1955 because of inflation. If we therefore add in a doubling of the properties, the December 31, 1972 stockholders' net worth increases from $541 million, by $545 million. to $1,086

million. Class A share is $186 million, or 17.2% of the equity before recapitalization, leaving $900 million or 82.8% for Class B. After recapitalization Class A has 74.5% and Class B has 25.5%. Class B loses to Class A 57.3 percantages points, or 70% of its equity, which is a dollar transfer to Class A from Class B of $623,000,000, yet Class A is to pay no tax, and Class B is penalized with prohibitive taxes!

Calculations for the above follow:

Dec. 31, 1972 Stockholder Equity	$541 million
Add because of inflation of the 1955 Property Values, Page 21, 1972 MOPAC Annual Report	545 million
Total stockholder Equity	$1,086 million
Class A share	186 million
Left for Class B	$ 900 million

Class A share before recapitalization $\frac{186}{1,086}$ = 17.2%

Class B share before recapitalization $\frac{900}{1,086}$ = 82.8%

100.0%

After recapitalization and full conversion of Preferred

	shares	Percent of Equity
Class A	1,864,050	74.5%
Class B	635,696	25.5%
	2,499,746	100.0%

Class A equity rose from 17.2% to 74.5%, up 57.3 percentage points times $1,086 million, or $623 million.

Class B equity dropped from 82.8% to 25.5%, or 57.3 percentage points times $1,086 million, or $623 million.

Percentage Equity lost by Class B $= \frac{57.3}{82.8} = 70\%$

Dollar value of each Class B share before and after recapitalization related to the market as of December 23, 1975

Class B Equity per share before recapitalization $= \frac{\$900,000,000}{39,731 \text{ Class B Shs.}} = \$22,650$

for which

Class B received 16 shares of $6.25 per share stated value plus $850 cash.

These 16 shares, which became 80 shares after a 5 to 1 split, were selling at about $16.00 on December 23, 1975, and were worth $1,280. Hence, the recapitalized Class B share was worth $1,280 plus $850, or $2,130 as of December 23, 1975, which is less than one tenth the approximate value of $22,650 before recapitalization. (This assumes no tax on the $850 which was treated as a current income dividend, even though it came out of the Class B Capital Account. In some cases the Class B stockholder lost 70% of the $850 because of taxes.)

f. Establishes Two Monumental Tax Frauds.

Page 12 of MOPAC Proxy Statement under Federal Income Tax Consequences indicates that Class A stockholders will incur *no* tax liability on the $623 million of property transferred to its account from the Class B stockholders, while the $850 cash distribution to the Class B stockholder from Class B's own capital account is to be taxed as ordinary income, thus establishing two tax frauds. This means that a Class B stockholder with several shares, who is not a corporation, could be taxed in a 70% bracket, while Alleghany,

which is a corporation, would be taxed at about 12%, or one third of what it should be taxed if the sale of its stock were treated as a capital gain, as it properly should be.

As a result of Alleghany's conspiratorial arrangements to make this recapitalization look like a dividend settlement, coupled with the principal Class A stockholders', Mississippi River Corp. and its officers', so far, successful endeavors to transfer $623 million worth of property to their own accounts by misrepresenting the relative rights of the MOPAC stockholders established under the "1956 Agreed System Plan" using Section 20a of the Interstate Commerce Act which was passed by Congress to discourage and prevent this kind of fraud, the Federal Government in these two ways has been bilked out of upwards of $100 million in taxes.

The Congressional mandate under Section 20a of the Interstate Commerce Act is clear:

> "The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier or service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purposes."

The Commission's order of December 14, 1973 Service Date is clearly contrary to every dictate of above mandate and has been used in this recapitalization proceeding to impair and abrogate its own legal contact laid contract laid down under the MOPAC "1956 Agreed System Plan," thus creating a tax fraud of monumental proportions against the Federal Government, against both classes of MOPAC stockholders, against the American taxpayer, against the

whole public interest, and violates the ex post facto provisions of Article I Sections 9 and 10, violates the impairment of contracts provision of Article I Section 10, and violates the due process provision of the Fifth Amendment of the United States Consitituion.

3. The court should find that the stockholder vote was based on fraud and is therefore worthless in affirming the recapitalization plan.

4. This court, under its jurisdicition mandate as outlined in Plaintiff's brief of August 6, 1975, paragraph 7 on page 4, should find that the ICC was *erroneous* and *arbitrary* by allowing these flagrant errors and omissions in the MOPAC Proxy Statement, *Salvino* vs. *U.S.* - District Court of Washington 1954, 119 F Supp 277.

The July 27, 1971 Staff Study for the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce House of Representatives (92nd Congress) found that "More than thirty-seven years later, the ICC has continued to ignore the Congressional mandate of Schedule A and has negligently failed to promulgate one single informational requirement for inclusion in a prospectus covering securities of rail and motor carriers.

"The cardinal purpose of Federal securities legislation has always been full and fair disclosure to the public. As Justice Brandeis observed: 'Sunlight is said to be the best disinfectant: electric light the most efficient policeman.' (Brandeis, *Other People's Money*. 62 (Nat'l Home Library Foundation ed. 1933).

"Once ample and reliable data is publicly advailable, investors and the general financial community are better able than any governmental agency to assess the inherent investment merits of securities." *Staggers' Report* supra (Pages 4 and 5)

The ICC has been erroneous and arbitrary by failing to promulgate informational requirements for securities under its jurisdiction and demonstrated its arrogance toward the Congressional mandate that it do so as set forth in Schedule A to the Securities Act of 1933 when the Commissioners wrote on Pae 64 of their order of December 14, 1973 (Docket #95) "Moreover, the Commission's jurisdiction under 20a is plenary and exclusive and independent of any other Federal authority." *Schwabacher* v. *United States* 334 US 182 at 197. Since the matter involved in this proceeding comes within the purview of section 20a, our jurisdiction in the proceeding is supreme and need not be coordinated with a reorganization proceeding in which the record has been closed for about 20 years."

Nothing could be more arbitrary and erroneous than to refuse to uphold and promulgate the relative rights and privileges of securities created 20 years earlier under the "1956 Agreed Plan." And nothing could be more detrimental to the "public interest" than aiding and abetting this breach of contract by transferring 60% to 70% of Class B equity to Class A. This type of conduct on the part of the ICC has destroyed the "public interest" where investment in railroad securities is concerned, particularly eastern rail securities. These roads have now become a burden to every taxpayer, and the result is far from the "public interest."

PART II
STOCKHOLDER VOTE IMPROPERLY TAKEN AND ICC ACTED ERRONEOUSLY AND ARBITRARILY IN ACCEPTING IT

1. The MOPAC stockholders vote on June 15, 1973 in this recapitalization plan was improperly taken. The plan required a majority of each class of stock to affirm. Of the 39,731 Class B shares outstanding, Alleghany owned 21,234 shares, or a majority of the shares voted. The shares were

held in trust by the Franklin National Bank, and were under continuing jurisdiction of the Interstate Commerce Commission, and should not have been voted. Without Alleghany's vote, the Class B would not have had a majority in favor of the plan and the plan could not have been affirmed.

2. When Alleghany illegally bought control of Jones Motor in order to be considered a common carrier, and thereby avoid coming under the jurisdiction of the Securities and Exchange Commission and the Investment Company Act of 1940, the ICC decision read:

> "We will further require as a condition to approval that all interlocking directorates between Alleghany and Penn Central, its subsidiaries, and affiliates be terminated. Prior to consummation, proof of such termination shall also be submitted to the Commission. *Chesapeake & O. Ry. Purchase*, 261 I.C.C. 239. Still further, in accordance with Alleghany's suggestions, and our own independent evaluation of the situation, we shall require as a condition for consummation of the proposal that the trusteeship of Alleghany's MoPac securities, as previously ordered by the Commission, be continued subject to the continuing jurisdiction of the Commission. The Commission in the future may either in response to a petition or on its own motion institute an investigation to determine whether the trust should be continued or whether Alleghany's divestitute of MoPac securities should be required." (109 MCC 333 at 350, Exhibit A attached)

Chairman Stafford, in dissenting to the report and order to allow the purchase of Jones Motor by Alleghany said:

> "Clearly, Alleghany violated section 5(4) of the act in acquiring the outstanding stock of Jones and Erie

without prior Commission approval. While I agree with the majority finding that such a violation will not automatically defeat the transaction, I find nothing in the record to show that overriding public interest warrants its approval. Alleghany's primary purpose in acquiring Jones, and its affiliates, is to lessen its tax burden...

"Furthermore, the report of the majority clearly recognizes the dangers inherent in Alleghany becoming a motor carrier. The report goes to great lengths to soften the impact by conditions which would, among other things, assure that Alleghany could not control Penn Central. The report rationalizes the real reason for the transaction, i.e., the tax benefits by accepting Alleghany's statement that it will reinvest such benefits to improve the operation of Jones." (109 MCC 333 at 356-8) supra.

Consequently, the primary purpose of the trust was to remove voting control of the MOPAC Class B stock from Alleghany so that Alleghany would not continue to be in violation of Section 5(4) of the Interstate Commerce Act in its control and purchase of Jones Motor. (109 MCC 333 at 350, 356-7.)

3. On Page 597 *Wood vs. U.S.* 132 F Supp 586, Judge Edward Weinfeld deals with the voting of trusteed stock as follows:

"The further contention that the ICC had the power to amend the trust agreement so as to reserve in the B & O the power to vote the stock in connection with any modification plan, and exercised that power here, appears to me to be untenable. In altering its pre-existing order the Commission was bound to grant a full hearing to interested parties, including notice of the

nature of the proceedings and an opportunity to be heard." (*Morgan* v. *United States*, 304 U.S. 1, 58 S. Ct. 999, 82 L. Ed. 1129; *Jordan v. American Eagle Fire Ins. Co.*, 83 U.S. App. D.C. 192, 169 F. 2d 281.

By allowing Alleghany to vote its trusteed stock without granting a full hearing to interested parties with respect to the trust indenture, the Commission was in error and arbitrary. The fact that Judge Edward Weinfeld accepted the Alleghany vote in this instant action, while the matter is under his continuing jurisdiction, is a contradiction of the law he recited in the Wood case supra at Page 597.

PART III
UNITED STATES SUPREME COURT UPHELD MOPAC "AGREED PLAN" IN 1967

1. The U.S. Supreme Court upheld the MOPAC "1956 Agreed Plan" when it handed down an 8 to 0 decision with one abstention on February 27, 1967, in *Levin v. Mississippi River Corp.* 386 US 162. The Court not only affirmed the voting rights of each class of stockholder, but it concerned its with the relative rights of each class of stock in and to the property, and attacked the ICC's "plenary character under Section 5(11)...with its consequent preemptive nature," by defending state law and by affirming the 1956 "Agreed Plan" Contract.

2. Justice Hugo L. Black, delivering the opinion of the Court, wrote:

"MoPac, by consolidating the two railroads that it already controls, will change its Class A stock from voting shares preferentially entitled to noncumulative dividends of not to exceed $5 per share annually to shares that participate equally in all of the earnings of the company. The Class B stock which now enjoys all of

> the earnings and the equity in excess of the present Class A preferences would be relegated to ordinary shares. As the Court of Appeals found, the effectuation of the plan would result in the present Class B holdings being engulfed by the larger number of Class A holdings.' It is apropos to note here that while the equity of each Class A share remains limited to $100, the value of the equity of the Class B shares is approximately $6,500 per share. The plan proposed to exchange four shares of stock of T & M for one share of MoPac Class B, which, under such values, is like exchanging four rabbits for one horse." (386 US 162 at 169)

Justice Black was so concerned about the inequities raised by the merger plan that during the hearing he enunciated his theory of "one-value, one-vote," (Transcript of Hearing Jan. 19, 1967 Case No. 352 and 359 Oct. Term 1966 at Page 59; 386 US 162, 1967) Under such a theory, the actual number of shares of stock would not necessarily determine voting power. Rather, the power apparently would be divided according to differing "values" of different classes of stock.

3. If the merger plan had not been defeated in the U.S. Supreme Court in 1967, Class A stock would have would up with 98% of the equity, leaving 2% for the Class B stock. Consequently, during the debate, Justice William O. Douglas said of the merger plan:

> "But as I understand it, this is one of those notorious pieces of predatory finance I have seen — and I have seen quite a few. It is an appropriation of this tremendous asset, value, by one block of stock from another bloc of stock. How could we possible conceive of that as fair, just and reasonable?" (Transcript of Hearing Jan. 19, 1967 Case No. 352 and 359 supra at Page 46.)

When the MOPAC attorney tried to convince Justice Black that the Interstate Commerce Commission would have a chance to see if the MOPAC deal is "fair," Justice Black observed, "Some things could be so unfair one might not even be willing to trust the Interstate Commerce Commission to decide it." (Transcript of hearing January 19, 1967, Case No. 352 and 359, at Page 60.)

4. In the 1967 merger plan MOPAC was found to be arbitrary and erroneous and the U.S. Supreme Court did not trust the ICC to uphold its own 1956 "Agreed Plan," so the high court did it for them.

5. In this instant recapitalization plan, it is incumbent upon this Honorable Court to again find the ICC arbitrary and erroneous, and require the Commission to uphold its own 1956 "Agreed Plan" so plaintiff does not lose 60% to 70% of his property to Class A stockholders who are paying no taxes on the transfer.

PART IV
COMMISSION ACTED UNCONSTITUTIONALLY AS TO THE MOPAC DISSENTING CLASS B STOCKHOLDERS, ALTHOUGH THERE WAS AN AFFIRMING BUT QUESTIONABLE STOCKHOLDER VOTE.

1. In *Wood* vs. *U.S.* 132 F Supp 586 (1955) at 594, wherein a recapitalization of the Western Maryland R.R., which had been approved by the stockholder and the ICC, the three Judge Court made these findings in setting aside the ICC order:

> "The promotion of any public interest in the increased stability of railroad securities generally or the alleged resulting greater confidence of investors in railroad securites, would not justify any alteration and modification of the equity securities of a financially

sound, efficiently equipped and well operated railraod, such as Western Maryland, where it is not shown that there is any need for the alteration and modification. It would not be a constitutional exercise of power under the Interstate Commerce Act and would be in violation of the "due process" provision of the Fifth Amendment for the Commission to approve a Plan which as the Commission states in its opinion, has as its "primary objective * * * * the elimination of the dividend arrearage on its first preferred stock, thereby making a declaration on its second preferred and common stock possible," just to promote the interest of the public or of investors generally in the stability or enhanced value, of railroad stock."

2. In *Levin* vs. *Mississippi River Corp.* 386 U.S. 162 (1967) supra in Part III where a recapitalization of the MOPAC through a merger scheme with one of its subsidiaries would have transferred all but 2% of Class B equity to Class A the Supreme Court Judges in a unanimous decision in favor of minority Class B stockholders concerned themselves with the fate of the dissenting stockholders should the merger plan be voted by a majority, and the Court shied away from trusting the matter to the ICC. The following appears in the Transcript of Hearings Jan. 19, 1967 Case No. 352 and 359 Oct. Term 1966 at Pages 28 and 29:

"MR. JUSTICE WHITE: Were the creditors paid off 100 percent? (Question relates to "1956 Agreed Plan.")

"MR. LOWENTHAL: The creditors were paid off in full and the old preferred stock holders were paid off in full. They got two and a half times as many new shares of preferred stock in Class A for their old preferred stock. So they all got paid in full; and what was left, their residual earnings went to Class B, the common stock holders.

"Mr. Justice Black suggested what seems to me to be clearly the case, that were the preferred stockholders here able to take over everything that belongs to the common stockholders, the Class B, merely by calling it a plan of merger and consolidation, it clearly would be unconstituional; and it was so held.

"I find one lower court Federal case, the Wood case, , which flatly held that if one class of stockholders tries to do that to another, under the Interstate Commerce Act, it would be unconstitutional. It cannot be done.

"MR. JUSTICE HARLAN: Supposing that the Class B stockholders voted in favor of the merger plan, would there be anything unconstitutional about it?

"MR. LOWENTHAL: If they voted in favor of it by virtue of their class vote?

"MR. JUSTICE HARLAN: By virtue of their class vote.

"MR. LOWENTHAL: No, it would not be unconsitutional.

"MR. JUSTICE WHITE: Wait a minute.

"MR. JUSTICE STEWART: What about the dissenters?

"MR. JUSTICE WHITE: We didn't say 100 percent.

"MR. JUSTICE BRENNAN: He said the majority.

"MR. LOWENTHAL: I quite agree, it would be unconstitutional as to the dissenters. It could not be done. That goes too far.

"*If the hypothetical vote in favor of the plan is designed*

to deprive a minority of what they are entitled to, then the Wood case makes perfectly clear that it is unconstituional." Emphasis supplied

3. Mr. Lowenthal represented Plaintiff Levin, a dissident Class B minority stockholder, in the 1967 case, and also represented Plaintiff Levin in this instant recapitalization action; however, in this latter case we do not find Plaintiffs Levin or LeVasseur, both dissident Class B minority stockholders, parties to the settlement agreement, but the law firms for the plaintiffs took down legal fees running into several millions of dollars, although their Class B clients gave up 60% to 70% of their equity to majority Class A defendants!

4. In this instant action where a recapitalization of the "financially sound, efficiently equipped and well operated" MOPAC railroad transfers 60% to 70% of Class B to Class A, though approved by a questionable stockholder vote and the ICC, there is sufficient precedent in the Wood Case and the Levin Case supra to find that the action has been unconstitutional with respect to dissident Class B stockholders, and was accomplished through questionable, erroneous and arbitrary means under the auspices of the ICC and the courts.

PART V
ARBITRARY ACTS OF THE INTERSTATE COMMERCE COMMISSION

1. ICC Attorney O'Hara argued on pages 70 through 72 of the record of proceedings on August 6, 1975 before this Court that the ICC had a deadline to meet in consummation of the recapitalization because of the settlement agreement; and therefore, it was permissible to make the ICC order of December 14, 1973 Service Date and Effective Date the same day, (Docket #95) instead of 20 days later as provided by statute under Section 17(5) of the Act.

2. There are two pieces of evidence that belie the deadline argument. First, the settlement date was extended by the coporate parties. Paragraph 1 of ICC Order Service Date January 24, 1974 (Docket #112) states "(3) telegram Communication from applicant, filed December 26, 1973, announcing extension of the consummation date from December 31, 1973 to January 31, 1974." And secondly, under the Alleghany purchase of Jones Motor, securities were subject to the continuing jurisdiction of the Commission. "The Commission in the future may either in response to a petition or on its own motion institutes an investigation to determine whether the trust should be continued or whether Alleghany divestiture of MOPAC securities should be required." (Alleghany - Jones Motor Supra at 350.) Exhibit A

3. The above truncating of the ICC hearing process, together with the other rule-rending short cuts outlined in plaintiff's Brief of August 6, 1975 on page 13 and 14 and *left undefended* by the Commission were arbitrary because as indicated above, the deadline was extendable and Alleghany had to get out of MOPAC securities with the ICC involved as a party to the whole performance.

PART VI
DEFENDANTS HAVE FAILED TO RESPOND ON THE MATTER OF RELATIVE RIGHTS OF CLASS A AND CLASS B STOCKHOLDERS UNDER THE MOPAC "1956 AGREED PLAN" OR TO PURPORTED EVIDENCE OF FRAUD IN THE MOPAC PROXY STATEMENT OF MAY 8, 1973.

1. Defendants have failed to properly respond to a number of allegations raised by plaintiff in his original complaint dated April 3, 1974 (Docket No.1), Ammended complaint dated June 10, 1974 (Docket No. 5), Opposition to MOPAC Intervention dated July 15, 1974 (Docket Nos. 7 &

12), Cross Motion Arguments dated December 4, 1974 (Docket Nos. 25 & 35) and Brief dated August 6, 1975. The most conspicious absence of response is on the matter of the relative rights of Class A and Class B stockholders under the MOPAC "1956 Agreed Plan" and purported evidence of fraud in the MOPAC Proxy Statement of May 8, 1973 as outlined in Part I above.

2. When the party holding the affirmative shows a statement of facts raising a presumption in his favor or otherwise make out a prime facie case, the burden of proof is cast on the opposite party (U.S. Cal 1854). The defendants, through inadvertence, or lack of foresight, or lack of a responsive answer to those points raised in Part I, have not seen fit to refute them; consequently, for the purposes of this brief, the court, after examining the record in juxtaposition to the "1956 Agreed Plan," (290 ICC 477 at 597 and 598) should find these allegations true, consider these points irrefutable and render a decision on that basis, finding that the defendants have been arbitrary and erroneous and not acted in the public interest in this instant recapitalization plan.

RELIEF SOUGHT

1. Plaintiff rests his case on these findings and prays for the relief sought in his original brief dated August 6, 1975, to which this is a supplement.

2. For minimum relief, plaintiff prays that as a result of these additional findings, particularly with respect to the Wood case supra in Part IV this Honorable Court will order an evaluation of plaintiff Class B stock as a disident stockholder so plaintiff will receive equal value for value

surrendered, instead of losing 60% to 70% of his equity to the Class A bloc.

Respectfully submitted,

/S/WILLIAM R. WESSON
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February 2, 1976

c.c. Court 6 copies with Exhibit A attached.
Attorney General of the United States
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Milton Rosenkranz, Esquire and Leon Leighton, Esquire
John Charles Vaiani
James C. Gabriel

See Certificate of Service, Page 21.

State of New Jersey
County of Ocean

William R. Wesson, being duly sworn, deposes and says that deponent is the plaintiff, pro se, in the within action; that deponent has read the foregoing brief and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Be it remembered that on this 2nd day of February 1976 personally appeared before me, a notary public of New Jersey, William R. Wesson, to me known and known to me to be the individual described herein and who has sworn to and executed the foregoing Brief, pro se, and he acknowledged to me that he executed the same.

Edwin A. Tobey
A Notary Public of New Jersey

NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 28, 1977

CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of February 1976 served this brief upon all parties of record in this proceeding by mailing a copy of this by first class mail, properly addressed to each party.

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.-76-443

WILLIAM R. WESSON, Pro Se, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for himself,

Plaintiff-Appellant, Pro Se

Joined By

JOHN CHARLES VAIANI, Pro Se, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for himself,

Plaintiff-Appellant, Pro Se

-v.-

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

Defendants-Appellees,

-and-

MISSOURI PACIFIC RAILROAD COMPANY

Intervening Defendant-Appellee

APPELLANTS' REPLY BRIEF

To Motion of Missouri Pacific Railroad Company to Affirm

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A study of Appellee MOPAC'S Motion to Affirm reveals that it does not reply to the Constitutional issue raised under the Fifth Amendment by dissident stockholder Appellants in this instant recapitalization which reduces MOPAC Class B stockholder equity by more than 61%. Appellee avoids and omits any discussion of *Wood* v. *United States* 132 F. Supp. 586 cited by Appellants'.

Appellee instead delivers a diatribe deprecating the significance of book value in this huge transfer of property from the Class B common equity bearing stockholder to the Class A $5 preference stockholder.

QUESTION PRESENTED IS SUBSTANTIAL

The taking of 61% or more equity from Class B stockholders and giving it to Class A stockholders in this instant MOPAC recapitalization is clearly unconstitutional as to dissident stockholders although there was an affirming vote. *Wood supra* (See J.S. F-18 and F-19)

Also the jurisdiction of this Honorable Court is affirmed in *Wood supra* at page 586. "Questions affecting constitutional powers and statutory authority can be raised on a resort to the courts to review an order of the Interstate Commerce Commission, and these are legal questions which do not involve any invasion of Commission's exclusive jurisdiction over matters which call for technical knowledge pertaining to transportation."

In *Wood supra* page 595 the Court is concerned that "stock will receive securities 'at least equal' to the value of those surrendered."

FACT AND LAW NOT DETERMINED IN COURTS BELOW

In his evaluation of the settlement which resulted in this instant recapitalization, Judge Edward J. Weinfeld in the U.S. District Court, Southern District of New York, set a standard which was followed through all the litigation in New York, in the ICC, in Missouri, and in New Jersey leading up to this appeal to the U.S. Supreme Court, when he wrote, "The Court's role is a more 'delicate one,' which requires a balancing of likelihoods rather than an actual determination of the facts and law in passing upon whether the proposed settlement is fair, reasonable and adequate to the Class B stockholders and MOPAC." *Levin* v. *Mississippi River Corporation* 59 FRD 353 (1973) at 361. Therefore, Judge Weinfeld failed to make meticulous findings of facts

and law as alleged on page 8 of Appellee's motion, because it was his stated intention not to. In order to find the facts as required by Rule 52 of the Rules of Civil Procedure, Judge Weinfeld would have had to order the property evaluated.

IMPORTANCE OF DETERMINING EQUITY VALUES

Using the Webster definition, equity is "the amount of value of property or properties above the total of liens or charges." Railroads by their nature are capital intensive industry. Their land holdings and properties tend to appreciate very rapidly in time of accelerated inflation as has been the case over the past 20 years since the MOPAC Reorganization in 1955. Consequently, a current evaluation is of prime importance in determining what each stockholder is putting into the recapitalization plan. The figures used by MOPAC to determine the share of the railroad owned by the Class B Common equity bearing stockholders on December 31, 1972, were based on 1955 property values in which case Class B owned 65.5% of the equity account before recapitalization. If the 1955 property values are doubled for the sake of argument to recognize inflation, then Class B owned 82.8% of the equity account before recapitalization. It matters not whether we refer to this as the equity account, book value, locomotives and tracks, or apples and oranges; if Class B owns 82.8% of it before recapitalization, then Class B must own 82.8% of it after recapitalization according to *Schwabacher* v *United States* 334 U.S.182 (1948) and *Wood supra*. The MOPAC Charter defines what Class B owns, ie all residuary values after $100 to Class A, but it is the *current evaluation of the property* which tells the Class B stockholder the value of what the Charter says he owns.

Consequently, the recapitalization can not be carried out legally under the Fifth Amendment to the Constitution and the above cited cases without an evaluation under Section 19a of the Interstate Commerce Act (49 USC 19a) in order to

establish what Class B Appellants contributed to the recapitalization.

The *"immutable"* aspect of the contract in the 1956 Agreed Plan of Reorganization pertains to *what* the Class B stockholder owns under the MOPAC charter, not its value. Value must be determined currently at the time of a recapitalization. Judge Learned Hand's sage observations on book value, actual value, market value, earnings, etc., as quoted on Page 20 of Appellee's motion must be interpreted. Judge Hand says that book value does not measure actual value. When measuring actual value, stock market value can *not* be used; for it is illusive. Was Penn-Central worth a stock market value of $87 per share on the eve of bankruptcy when it already had a negative working capital position, or is it worth a stock market value of $1 per share after the bankruptcy, where it is now trading?

Actual value can only be determined through a 49 USC 19a evaluation. The percentage of the Class B ownership can then be determined; and if Class B puts a given percentage of the railroad into a recapitalization, it must take the same percentage out, *not* 61% less.

VOTING OF ALLEGHANY SHARES IN VIOLATION OF SECTION 5(4) OF INTERSTATE COMMERCE COMMISSION ACT

Contrary to Appellee's contention that voting by the trustee was proper, the voting of Alleghany shares by SAF Co., nominee for the trustee, Franklin National Bank was a violation of Section 5(4) of the ICC Act because Alleghany was in control of Jones Motor. Section 5(4) follows in part:

> "It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of a subparagraph (a) thereof, or to accomplish or

effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a *voting trust or trusts*, or in any other manner whatsoever." (Emphasis supplied)

Hence, there was not a majority vote by the Class B shareholders when Alleghany's 21,234 shares of the total 39,731 shares is eliminated.

NATURE OF THE CLASS ACTION

Appellee's Motion omits the nature of the class action from the reprinted Orders of Judge Frederick van Pelt Bryan on pages 56a through 58a.

"This action was commenced by Betty Levin on December 29, 1967. Alleghany Corporation and Robert LeVasseur subsequently were, upon their motions, permitted to intervene as additional plaintiffs.

"The complaints filed by all three plaintiffs charge, in substance, that dividends declared and paid by the MoPac board of directors on the Class B stock have been and are unreasonably and unjustifiably low; that Mississippi has misused its voting control over MoPac's board of directors in furtherance of a plan and conspiracy with said directors to improperly favor Mississippi and other Class A stockholders at the expense of the Class B stockholders; and that such conduct will continue unless enjoined by the Court. The complaints ask the Court to direct MoPac to pay reasonable dividends for past years to all Class B stockholders, plus interest thereon; that MoPac be directed to pay reasonable dividends on the Class B stock in the future; and that plaintiffs be awarded their costs, expenses and

reasonable counsel fees incurred in prosecuting this action. In addition to these claims on behalf of the class, plaintiffs Levin and LeVasseur also assert derivative claims on behalf of Mopac."

Hence, the action was started based on dividends and conspiracy, with no interveners after December 2, 1968, but was convoluted into a recapitalization without recapitalization ever being mentioned in the pleadings. The 61% or more of property rights lost were never in jeopardy under the original statement and intent of Judge Bryan's Order but became jeopardized by a settlement agreement which was signed only by the corporate giants involved, Alleghany, Missouri Pacific Railroad, and Mississippi River Corporation. The minority stockholders, Levin and LeVasseur, were not signators to the settlement agreement.

CONCLUSION

Appellant's prayer remains for a due process evaluation of the property so they may receive from the recapitalization plan the exact amount of equity they contributed in the form of Common Stock and *not cash* as implied on page 18 of Appellee's motion.

Respectfully submitted,

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